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IN THE

Supreme Court of the United States

REPUBLIC OF POLAND AND MINISTRY OF STATE TREASURY OF THE REPUBLIC OF POLAND
Petitioners,

v.

THEO GARB, BELLA JUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, SAUL KLAUSNER AND GOLDIE KNOBEL, on behalf of themselves and all others similarly situated,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a foreign sovereign's entitlement to absolute sovereign immunity with respect to acts of expropriation within its territory occurring prior to the passage of the Foreign Sovereign Immunities Act of 1976 (the "FSIA") may be treated as a question of fact rather than as a question of law.

2. Whether a court may refuse to defer to the Executive Branch's statement that a foreign sovereign had a settled expectation of absolute foreign sovereign immunity with respect to acts of expropriation within its territory occurring prior to the passage of the FSIA.

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PETITION FOR A WRIT OF CERTIORARI

The Republic of Poland and the Ministry of State Treasury of the Republic of Poland (collectively, "Poland") respectfully petition this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court opinion (per Korman, D.J.) dismissing the complaint (Pet. App. B) is published at 207 F. Supp. 2d 16 (E.D.N.Y. 2002). The Court of Appeals Summary Order (per Kearse, J., Cabranes, J. and Straub, J.) vacating and

remanding to the District Court (Pet. App. A) is unpublished, but is available on Westlaw at 2003 WL 21890843 (2d Cir. Aug. 6, 2003).

JURISDICTION

The Summary Order of the Second Circuit was entered on August 6, 2003. Poland invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. §§ 1330, 1441(d), 1602-1611, as amended (Pet. App. C (relevant portions)).

INTRODUCTION

The Second Circuit decision in *Garb* is one of five recent appellate decisions that has created a conflict regarding the formerly settled doctrine of absolute foreign sovereign immunity relating to sovereign acts pre-dating the FSIA. *Compare Garb,* Pet. App. A*; Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3154 (U.S. Aug. 19, 2003) (No. 03-284); and *Whiteman v. Republic of Austria*, Pet. App. A, Nos. 02-3087, 02-9361 (2d Cir. Aug. 6, 2003), *petition for cert. filed*, __ U.S.L.W.__ (U.S. Sept. 30, 2003) (No. 03-___), *with Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *amended by* 327 F.3d 1246 (9th Cir. 2003), *cert. granted,* 72 U.S.L.W. 3092 (U.S. Sept. 30, 2003) (No. 03-13); and *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003). In its decision, the Second Circuit agreed with the other Circuit Courts to this extent: the FSIA is not expressly retroactive and under this Court's decisions in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); and *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), the FSIA cannot be applied retrospectively if the defendant foreign sovereign had

a settled expectation of absolute immunity when the claim arose. Where the Circuit Courts have diverged is *how* to determine whether a foreign sovereign had a settled expectation of immunity such that suit under the FSIA would be impermissibly retroactive.

On September 30, 2003, this Court granted a writ of certiorari to the Republic of Austria in *Altmann* with respect to the following question: "Does the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952." *See* 72 U.S.L.W. 3092 (U.S. Sept. 30, 2003) (No. 03-13). The *Garb* case presents questions that are separate and distinct from the question presented in *Altmann*; namely, this case presents questions concerning what standards should be applied in the event that this Court holds that the FSIA cannot be applied retrospectively if to do so would defeat a foreign sovereign's settled expectation of immunity from suit at the time the conduct occurred. In addition, the Second Circuit in *Garb* failed to defer to the Executive Branch's repeated statements that Poland had a settled expectation of absolute immunity with respect to the alleged acts of expropriation within its borders after World War II. The question certified in *Altmann* does not appear to address whether a court must dismiss a case when so informed of the Executive Branch's position.[1]

The Second Circuit has transformed a foreign sovereign's settled legal expectation of absolute immunity from suit for non-commercial acts occurring prior to the FSIA into an ill-defined issue of fact. This result is at odds not only with

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[1] Should this Court grant Poland's petition, Poland is prepared to expedite its briefing so that the case may be heard with *Altmann*.

settled law, but also creates serious foreign policy implications for both foreign sovereigns and the Executive Branch.

Prior to *Altmann*, *Abrams*, *Garb* and *Whiteman*, no U.S. court in the almost 200 years preceding enactment of the FSIA had ever recognized an exception to the doctrine of absolute foreign sovereign immunity regarding a foreign state's expropriation of property within its own territory. As such, the lower courts recognized that foreign sovereigns had a settled expectation of absolute sovereign immunity that was limited for the first time by the FSIA, which codified a number of new exceptions to sovereign immunity.

The Second Circuit has now held that before a decision can be made on a foreign sovereign's settled expectation of absolute immunity, the lower courts must make unspecified findings of fact concerning the U.S. Department of State's policy with respect to the sovereign immunity enjoyed by the particular foreign state at the time the conduct at issue occurred. The Second Circuit ordered this "factual inquiry" notwithstanding the fact that the Executive Branch had repeatedly stated that Poland would have been absolutely immune from suit in the United States for the acts of expropriation at issue. (Pet. Apps. D-F) As such, the Second Circuit decision implies that there may be heretofore unrecognized exceptions to the principle of absolute foreign sovereign immunity.[2]

The Second Circuit decision is in direct conflict with (i) the District of Columbia Circuit's decision in *Joo v. Japan*, where the court held that as a matter of law, Japan had a

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[2] The Ninth Circuit in *Altmann* took a different, but equally divergent, approach in recognizing for the first time, as a matter of law, an exception to absolute sovereign immunity with respect to Austria's alleged expropriation of private property from Jews prior to World War II. *Altmann*, 317 F.3d at 965. Unlike the Second Circuit, however, the Ninth Circuit treated sovereign immunity as a question of law.

settled expectation of immunity for its conduct during World War II (332 F.3d at 684); and (ii) the Eleventh Circuit's decision in *Jackson v. People's Republic of China*, where the court held that as a matter of law, China had a settled expectation of immunity with respect to its nullification of bond contracts in the years before the 1952 Tate Letter (794 F.2d 1490, 1497-98 (11th Cir. 1986)).[3] The Second Circuit decision also is at odds with the Ninth Circuit decision in *Altmann* to the extent it mandates the involvement of the Executive Branch in a non-specific fact-finding process concerning absolute sovereign immunity.

This Court's intervention is required to resolve the confusion in the Courts of Appeal over the nature of absolute foreign sovereign immunity as applied to claims arising prior to the FSIA. Allowing the present split in the Circuits to continue renders uncertain and unsettled a particularly sensitive area of foreign affairs – the extent to which a foreign sovereign may be sued in the United States over its alleged pre-FSIA acts of expropriation in its own territory. If this Court agrees that the expropriation exception of the FSIA cannot apply retrospectively to defeat a foreign sovereign's settled expectation of absolute immunity from suit, the lower courts still may require guidance as to how to determine whether a foreign sovereign had such a settled expectation of absolute immunity. Poland and other foreign sovereigns that have been, or may be, subject to claims based on their pre-

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[3] The so-called Tate Letter, issued in 1952, announced that foreign sovereign entities would no longer enjoy sovereign immunity under U.S. law for actions arising from commercial activities. *See* Letter from the Legal Adviser of the State Department (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976). The Tate Letter did not purport to alter the law on sovereign immunity with regard to actions arising from expropriations and has no application to this case.

FSIA non-commercial acts also are entitled to certainty regarding this extremely important application of U.S. law.

STATEMENT OF THE CASE

1. This case was brought as a putative class action by twelve named plaintiffs who sought the return of real property located in Poland and/or damages for the expropriation of that property by Poland in the years immediately following World War II. (Pet. App. B at 11a) Poland moved to dismiss on the grounds, *inter alia*, that (i) absolute sovereign immunity barred Plaintiffs' claims because they were predicated on events predating enactment of the FSIA and the 1952 Tate Letter; and (ii) even if the FSIA did apply, Plaintiffs could not establish any exception to immunity. On June 26, 2002, the District Court granted the motion, holding that the doctrine of absolute sovereign immunity barred Plaintiffs' claims and that the FSIA could not be applied retroactively to defeat Poland's settled expectation of absolute immunity. *See* Pet. App. B at 50a. The District Court further found that, even if the FSIA applied, Plaintiffs had failed to establish any exceptions to immunity. *See* Pet. App. B at 33a.

2. The Second Circuit consolidated the *Garb* appeal with the *Whiteman* appeal. In a consolidated Summary Order, the Second Circuit vacated the District Court ruling in *Garb*. Applying *Landgraf* and *Hughes Aircraft*, *supra*, the Second Circuit agreed that "whether the FSIA applies retroactively in a particular case depends on whether such application would have an impermissible 'retroactive effect'—that is, whether applying the FSIA would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." (Pet. App. A at 5a) (internal quotes and citations omitted). "Whether or not the FSIA applied retroactively . . . depended on whether the plaintiffs in a particular case 'could

have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment.'" (*Id.* (quoting *Abrams*, 332 F.3d at 186)). The United States appeared in support of Poland and repeatedly confirmed Poland's expectation of immunity. (*See* Pet. Apps. D-F) Notwithstanding these statements by the Executive Branch, the Second Circuit remanded the case for unspecified factual findings as to the U.S. Department of State's policy with respect to the sovereign immunity of Poland in the post-World War II period prior to enactment of the FSIA.

3. On September 10, 2003, the Second Circuit granted Poland's motion to stay the issuance of the mandate for 45 days pending the filing of a petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT HAS ALTERED THE RULE OF ABSOLUTE FOREIGN SOVEREIGN IMMUNITY PREVIOUSLY AFFORDED TO A FOREIGN SOVEREIGN WITH RESPECT TO ACTS OF EXPROPRIATION WITHIN ITS TERRITORY PRIOR TO THE PASSAGE OF THE FSIA.

The Second Circuit decision casts aside the centuries-old rule of absolute foreign sovereign immunity that applied to a foreign sovereign's non-commercial acts prior to the enactment of the FSIA in favor of a "factual inquiry" into what immunity a particular foreign sovereign may have enjoyed at the time the acts giving rise to the claims occurred. This "factual inquiry" is without foundation in U.S. foreign sovereign immunity jurisprudence, and highlights a conflict among the Circuit Courts which affects important and recurring questions of foreign affairs. For these and other reasons discussed herein, the writ should be granted.

A. Foreign Sovereigns Previously Were Entitled To Absolute Foreign Sovereign Immunity.

Until the Tate Letter in 1952 (addressing commercial activity by foreign sovereigns), the United States adhered to the rule of absolute sovereign immunity, pursuant to which a foreign sovereign "cannot, without his consent, be made a respondent in the courts of another sovereign." *Alfred Dunhill*, 425 U.S. at 711; *see also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). With respect to expropriation claims, the rule of absolute immunity remained in place until the enactment of the FSIA which, for the first time, created an express exception relating to expropriation. *See* 28 U.S.C. § 1605(a)(3).[4]

The Eleventh Circuit applied this settled rule of law in holding that the FSIA could not be applied retroactively in an action for payment on bearer bonds issued by the Chinese government in 1911. *Jackson*, 794 F.2d at 1497-98 ("[T]o give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952).") The Second Circuit reached the same result in an action against the former Soviet Union on debt instruments issued by the Russian Imperial Government in 1916. *See Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988). The court in *Carl Marks* affirmed the lower court's dismissal for lack of subject matter jurisdiction, holding that the FSIA was inapplicable to claims arising before the State Department issued the Tate Letter because to rule otherwise would "affect adversely the USSR's settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts."

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[4] As noted, the Tate Letter did not purport to alter the immunity of foreign sovereigns with regard to expropriation. *See Alfred Dunhill*, 425 U.S. at 704 (expropriation is an exercise of "Governmental powers").

Id. at 27.[5] The United States filed a Statement of Interest in both *Jackson* and *Carl Marks*, confirming that the FSIA was neither expressly retroactive nor should it be applied so as to affect the settled antecedent rights of foreign states. *See Jackson*, 794 F.2d at 1492, 1495; *Carl Marks*, 841 F.2d at 26-27.

B. The Second Circuit Has Transformed The Inquiry Into A Question Of Fact.

The Second Circuit now has cast aside the settled rule of absolute immunity in favor of a case-by-case exercise in historical "fact-finding." This fact-intensive analysis denies foreign sovereigns one of the fundamental and settled entitlements of immunity—that of "*immunity from suit* rather than a mere defense to liability," which is effectively lost by placing upon a foreign sovereign the burdens of litigation such as discovery. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). This result is particularly perverse where, as here, the immunity in question is *absolute* immunity.

Nor is it clear what facts a court should deem relevant, particularly where, as here, the U.S. government expressed its view, on three separate occasions, that Poland had a settled expectation of immunity for the alleged acts of expropriation at issue.[6] In remanding for an additional "factual inquiry" the

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[5] Neither *Garb* nor *Abrams* cites *Carl Marks*.

[6] *See* Pet. App. D at 74a ("the Court's reasoning in *Carl Marks* compels the conclusion that the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), does not apply retroactively to expropriations effected by Poland during the 1940's and 1950's"); Pet. App. E at 88a ("at the time of the 1960 Agreement, Poland would have been immune from suit on such claims"); Pet. App. F at 97a-98a ("plaintiffs could not have asserted their claims in United States courts at the time they arose, and the subsequent enactment of the FSIA does not permit them to go forward now") and ("the State Department's adoption of the restrictive theory in 1952 provides no support for the application of the FSIA's expropriation

Second Circuit did not even acknowledge these clear statements by the Executive Branch.[7] The Second Circuit also offered no further guidance on the inquiry to be conducted other than to "give the parties the opportunity to present particular evidence relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases" and to "direct the District Courts to invite the participation of the Department of State in developing a record to support their determinations." Pet. App. A at 7a.

The Second Circuit's holding disregards the fact that expropriation was always viewed as a quintessentially sovereign activity, and thus foreign sovereigns were accorded immunity as to expropriation claims as a matter of law, even under the restrictive theory of immunity. Pet. App. D at 75a; Pet. App. F at 101a-102a.[8]

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exception to plaintiffs' claims."). Exacerbating the problem is the hypothetical nature of the inquiry. As the United States noted in urging the Second Circuit to reject a case-by-case, fact-specific determination of immunity, such a judgment "ask[s] a court to inquire not into established legal standards, but into evidence of expectations of half a century past that are without anchor to governing law then or now." Pet. App. F at 104a.

[7] The record also reveals that Plaintiffs have never offered any evidence suggesting that the United States would not have recognized Poland's sovereign immunity for the alleged acts of expropriation at issue.

[8] As the United States and the District Court also recognized, Plaintiffs' claims here arise from the actual expropriation of their property, not the subsequent operation of it. *See Garb*, Pet. App. B at 34a-35a; Pet. App. D at 76a; Pet. App. F at 102a. This is consistent with *Saudi Arabia v. Nelson*, 507 U.S. 349, 361-63 (1993) (fundamentally sovereign acts may not be recharacterized as "commercial" acts for purposes of FSIA commercial activity exception).

C. The Second Circuit's Test May Alter The Standard Of Review.

The Second Circuit's casting of absolute sovereign immunity as a matter of historical fact-finding will have serious consequences. By rewriting the question of sovereign immunity as a factual rather than legal question, determinations by the District Courts may be subject to a more deferential standard of review. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988). This shift is at odds with this Court's statement in the analogous context of qualified immunity in civil rights actions that "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (affirming the propriety of *de novo* appellate review of qualified immunity determinations). This change in the standard of review would further disturb the settled expectations of foreign states, for whom sovereign immunity has always been seen as a question of law subject to *de novo* review.

II. THE CIRCUIT COURTS DISAGREE ON HOW TO DETERMINE WHETHER A FOREIGN SOVEREIGN HAD A SETTLED EXPECTATION OF ABSOLUTE FOREIGN SOVEREIGN IMMUNITY.

The Courts of Appeal are in general agreement that the retroactive application of the FSIA turns on "whether the ... statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. *See Garb*, Pet. App. A at 5a; *Abrams*, 332 F.3d at 185-88; *Jackson*, 794 F.2d at 1497-99; *Joo*, 332 F.3d at

683-86; *Altmann*, 317 F.3d at 962-67.[9] Where the courts now diverge, however, is on the question of how to determine whether a foreign state had a settled expectation of absolute sovereign immunity at the time the acts giving rise to the claims occurred.

In contrast to the fact-intensive inquiry ordered by the Second Circuit, the D.C. Circuit in *Joo* and the Eleventh Circuit in *Jackson* correctly relied on the long-standing rule of absolute foreign sovereign immunity in concluding that Japan and China, respectively, could not be sued under the FSIA for acts occurring at a time when absolute immunity was the settled law.

In *Joo*, the D.C. Circuit held that application of the FSIA's commercial activity exception to events that occurred prior to 1952 would interfere with the "settled expectation, left undisturbed by the Congress, that Japan would not face suit in the courts of the United States for its actions during World War II." 332 F.3d at 687. The D.C. Circuit found, as a matter of law, that Japan was absolutely immune, even with respect to alleged violations of international law and human rights. *See Joo*, 332 F.3d at 683 ("a foreign sovereign justifiably would have expected any suit in a court in the United States [before 1952]—whether based upon a public or a commercial act—to be dismissed unless the foreign

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[9] The Circuit Courts agree that Congress did not make the FSIA expressly retroactive. *See Abrams*, 332 F.3d at 184; *Jackson*, 794 F.2d at 1497; *Joo*, 332 F.3d at 685-86. Moreover, the Circuit Courts correctly interpret *Landgraf*, *Hughes Aircraft* and *St. Cyr*, to understand that to the extent that a party did possess a settled expectation of absolute foreign sovereign immunity, application of the FSIA would be impermissibly retroactive because the FSIA created previously non-existent exceptions to that immunity and therefore affected a foreign sovereign's substantive rights, which rights are outcome determinative. *Garb*, Pet. App. A at 6a; *Abrams*, 332 F.3d at 180-81; *Joo*, 332 F.3d at 683; *Altmann*, 317 F.3d at 964-65.

sovereign consented to the suit"). The D.C. Circuit did not find it necessary to ask what position the State Department or the Executive Branch would have taken on the particular facts in those cases. Similarly, in *Jackson*, the Eleventh Circuit recognized that "to give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)." 794 F.2d at 1497-98.

In contrast to *Joo* and *Jackson*, the Ninth Circuit's decision in *Altmann* diverged from settled law to the extent it implied that historical facts may create exceptions to the rule of absolute sovereign immunity. *Altmann* held that Austria could not have had a settled expectation of immunity in connection with the taking of six paintings from an Austrian Jewish family during the Nazi era. *See* 317 F.3d at 965. The Ninth Circuit reasoned that the FSIA could be applied retroactively because Austria "could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of 'grace and comity' for the wrongful appropriation of Jewish property." *Id.* In so holding, the Ninth Circuit created an exception to the rule of absolute immunity that had never before existed.[10]

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[10] The Ninth Circuit's reasoning is flawed. For example, *Altmann* relied heavily on the so-called "Bernstein Letter." 317 F.3d at 965. Neither the Bernstein Letter nor the *Bernstein* case, however, had anything to do with sovereign immunity. *See Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249-50 (2d Cir. 1947) (Hand, J.) (act of state doctrine barred action against Dutch company that had acquired plaintiff's property from Nazi officials who had expropriated it). This result was reversed only when the United States made clear that the act of state doctrine should not be recognized. *Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954). The Bernstein Letter had no bearing on the sovereign immunity of the Nazi or any other government. *See also Zwack v. Kraus*

The Second Circuit's requirement of a case-specific "factual inquiry" into the sovereign immunity of the particular foreign state may be read as impliedly endorsing the flawed conclusion in *Altmann*. However, a critical distinction between the approaches of *Altmann* and *Garb* is the treatment of sovereign immunity as a question of law to be resolved by the court alone, not an issue of fact, *inter alia*, requiring the intervention of the Executive Branch.

The question certified in Altmann does not appear to address what standards should be applied by the lower courts in the event this Court holds that the FSIA cannot be applied retrospectively if to do so would defeat a foreign sovereign's settled expectation of absolute immunity at the time the conduct occurred. Absent such guidance, the end result of the decisions in *Garb, Whiteman, Altmann, Joo* and *Jackson* will be that the analysis of absolute foreign sovereign immunity for acts occurring prior to the FSIA will differ based on the Circuit in which an action is brought. In the D.C. and Eleventh Circuits, because a foreign state is absolutely immune for actions based on non-commercial conduct occurring prior to the FSIA, irrespective of the nature of the acts at issue, the FSIA will not be applied retroactively. In the Ninth Circuit, a foreign state may be absolutely immune for its pre-FSIA non-commercial conduct unless it is of a "shocking" nature as determined by the court. In the Second Circuit, a foreign state's immunity for pre-FSIA acts will depend on "fact finding" that will include a required appearance by the United States. This divergence among the Circuits places foreign states in the untenable position of not knowing whether, and to what extent, they can be haled into a U.S. court for historical acts that occurred solely within their

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Bros. & Co., 237 F.2d 255, 260-61 (2d Cir. 1956) (recognizing Hungary's immunity from suit, but declining, under *Bernstein*, to recognize challenged expropriation).

territory. It also will encourage forum shopping by plaintiffs seeking to avoid absolute immunity. This Court's intervention is required to resolve this conflict among the Circuits.

III. APPLICATION OF ABSOLUTE FOREIGN SOVEREIGN IMMUNITY RAISES IMPORTANT AND RECURRING QUESTIONS OF FOREIGN AFFAIRS.

The Second Circuit decision also implicates important issues of foreign affairs that are not limited to the cases currently pending before this Court and which do not appear to be addressed by the question certified in *Altmann*. While recognizing that its decision could raise "justiciability concerns," Pet. App. A at 7a-8a n.1, the Second Circuit failed to defer to the Executive Branch's right to conduct foreign affairs. The Executive Branch stated unequivocally, in multiple briefs and at oral argument, that Poland would have been entitled to absolute foreign sovereign immunity and that the FSIA should therefore not be applied retroactively. *See supra* n.6. Ignoring these clear pronouncements, the Second Circuit remanded the case for further factual findings "relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases" and directed the district court to invite the Department of State to participate. Pet. App. A at 7a.

The Second Circuit's refusal to defer to the expressed view of the Executive Branch is at odds with pre-FSIA jurisprudence on absolute immunity on which the Second Circuit purported to rely. *See* Pet. App. A at 6a (recognizing that "[j]udicial determinations of jurisdiction over sovereign states prior to the FSIA 'usually deferred to the decision of the executive' regarding sovereign immunity, which was often expressed in the form of a 'suggestion of immunity' filed by the Department of Justice at the request of the Department of

State.") Moreover, the Second Circuit decision places extraordinary burdens upon the U.S. government, as it will effectively be required to appear in every case involving the potential retroactive application of the FSIA.

The Second Circuit's unprecedented requirement that a foreign state participate in a "factual inquiry" before the question of its absolute foreign sovereign immunity is resolved will also impair our nation's foreign relations. As this Court held in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918):

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

246 U.S. at 303-304 (internal citations omitted). As a quintessentially sovereign activity, expropriation cases are particularly sensitive. *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398, 428 (1964) (noting that such issues "touch much more sharply on national nerves").[11]

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[11] *Altmann*, *Abrams*, *Whiteman*, *Garb* and *Joo* highlight the growing number of cases filling U.S. courts seeking vast reparations from foreign states based on alleged historical wrongs. Each of these cases asks U.S. courts to pass judgment upon foreign states for alleged acts which took place within their own borders more than a half century ago. *See, e.g.*, *Altmann*, 317 F.3d at 954 (seeking return of paintings confiscated during the Nazi occupation of Austria); *Abrams*, 332 F.3d at 173 (seeking

In light of the sensitive issues of foreign relations at issue, Poland urges this Court to invite the views of the United States on this Petition. The United States has expressed its views in lower court cases relating to potential retroactive application of the FSIA, and expressed its views before the Second Circuit in *Garb*. In addition, the Second Circuit's decision raises serious federalism issues by requiring the Executive Branch to be involved in all cases raising the retroactivity issue as to the FSIA.

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reparations from French national railroad company based on German deportation of Jews and others from France during World War II); *Whiteman*, Pet. App. A at 4a-5a (seeking damages for expropriations from Jews in Austria during the Nazi era); *Joo*, 332 F.3d at 679 (seeking reparations against Japan for sexual enslavement of women during World War II). Other cases pending in the District Courts demonstrate that the issue of absolute foreign sovereign immunity for pre-FSIA conduct will not end with these five cases. *See Cruz v. United States*, No. C-01-00892CRB, 2003 WL 21518119 (N.D. Cal. Jun. 24, 2003) (action against United States and Mexico for wages earned as "braceros" during World War II); *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686 (N.D. Cal. 2003) (seeking restitution of property taken during World War II); *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659 (N.D. Cal. 2002) (same).

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Second Circuit reversed. If this Court does not grant the Petition, Poland respectfully requests that the Court hold this Petition pending the Court's decision in *Altmann*.

Respectfully submitted,

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